

1 KAREN P. HEWITT
2 United States Attorney
3 STEVE B. CHU
4 Assistant U.S. Attorney
5 California Bar No. 221177
6 Office of the U.S. Attorney
7 880 Front Street, Room 6293
8 San Diego, CA 92101-8893
9 Telephone: (619) 557-5682

10 Attorneys for all Federal Defendants

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

10 MICHAEL FOX,) Civil Case No. 07CV2388-DMS (POR)
11 Plaintiff,)
12 v.) OPPOSITION TO PLAINTIFF'S
13) MOTION TO SET ASIDE
14 UNITED STATES OF AMERICA) DEFENDANTS MOTION TO
15) DISMISS AND FURTHER SETTING
16) ASIDE THE COURTS ORDERS TO
17) IT
18) Defendant.) Date: August 15, 2008
19)) Time: 1:30 p.m.
20)) Crtrm: 10
21)) Judge: Hon. Dana M. Sabraw
22)) [No Oral Argument Unless Requested
23) by the Court]
24)
25)
26)
27)
28)

I. INTRODUCTION

2 Plaintiff Michael Fox filed his operative complaint, the First Amended Complaint
3 (hereafter “FAC”), on January 30, 2008. Thereafter, the Federal Defendants filed a motion to
4 dismiss on April 7, 2008. The Court granted the Federal Defendants’ motion to dismiss on
5 June 24, 2008, and entered judgment in favor of the Federal Defendants on the same date,
6 thereby dismissing all of Plaintiff’s claims. Plaintiff now brings what appears to be a post-
7 judgment motion to set aside the judgment, which was filed on July 7, 2008. The Federal
8 Defendants submit this brief in opposition to Plaintiff’s motion to set aside. As discussed below,
9 Plaintiff’s motion lacks any evidentiary support. In particular, Plaintiff fails to present new
10 evidence, demonstrate a change in law, or show that the Court’s ruling resulted in manifest
11 injustice.

II. DISCUSSION

14 Plaintiff has filed a motion, vaguely titling it as a “Motion to Set Aside Defendants
15 Motion to Dismiss and Further Setting Aside the Court’s Orders to it.” While this does not
16 clarify the basis for Plaintiff’s motion, Plaintiff also fails to cite any legal authority throughout
17 his papers. The motion appears to be a post-judgment motion to set aside the judgment, but may
18 also be construed as a motion for reconsideration. In either event, Plaintiff fails to meet the
19 applicable legal and evidentiary standard required to obtain the relief sought.

A. Plaintiff Fails to Meet the Standard Required for a Motion to Set Aside the Verdict

23 Rule 60(b) permits a party to move for relief from a judgment or from an order for various
24 reasons, including mistake, inadvertence, surprise, excusable neglect, newly discovered evidence
25 that could not have been discovered with reasonable diligence, fraud or other misconduct of an
26 adverse party, or any other reason justifying relief from the operation of the challenged decision.
27 Fed. R. Civ. P. 60(b).

28 In order to succeed in the Ninth Circuit, a motion for reconsideration must accomplish

1 two general goals: (1) the motion must demonstrate why a court should reconsider its prior
 2 decision; and (2) the motion must "set forth facts or law of a strongly convincing nature to
 3 induce the court to reverse its prior decision." Painting Industry of Hawaii Market Recovery
 4 Fund v. United States Dept. of the Air Force, 756 F. Supp. 452, 453 (D. Haw. 1990).^{1/} Stated
 5 another way, the Plaintiff must show "extraordinary circumstances" to justify her motion.
 6 United States v. Alpine Land & Reservoir Co., 984 F.2d 1047, 1049 (9th Cir. 1993).

7 The Ninth Circuit has provided guidance by identifying three major grounds that might
 8 justify reconsideration: "(1) an intervening change in controlling law; (2) the availability of new
 9 evidence or an expanded factual record; and (3) the need to correct a clear error or prevent
 10 manifest injustice." Kern-Tulare Water District v. City of Bakersfield, 634 F. Supp. 656, 665
 11 (E.D. Cal. 1986), aff'd in part and rev'd in part on other grounds, 828 F.2d 514 (9th Cir. 1987).

12 No change in controlling law has been identified by Plaintiff or is known to have
 13 occurred. Therefore, if his motion is to be granted, it must be based on "new evidence" or the
 14 "need to correct a clear error or prevent manifest injustice." Kern-Tulare Water District, 634
 15 F. Supp. at 665. However, he has not identified any new such evidence nor, as discussed below,
 16 shown any manifest injustice.

17 Plaintiff's motion is essentially a summary of the events that have already been discussed
 18 in his FAC. He has failed to provide any new evidence that has not already been discussed.
 19 Plaintiff describes a series of alleged events, including a staged car wreck and the belief that he
 20 is under constant surveillance by the government. These allegations were considered and ruled
 21 upon in the Court's June 24, 2008 order. Plaintiff raises some factual allegations about his
 22 current physical condition, and his attempts to retain counsel, however, none of these alleged
 23 facts has any bearing on whether the Court should have dismissed the action. Moreover,
 24 Plaintiff's attempt to retain counsel is not a "new" matter as this has been raised by Plaintiff in
 25 his prior papers. (FAC at ¶1F.) In order for a matter to be considered new for purposes of a
 26 motion for reconsideration, Plaintiff is "obliged to show not only that [the] evidence was newly

27
 28 ^{1/}The decision was a denial of a motion for reconsideration. The underlying decision (of which
 reconsideration was sought) was later appealed and reversed by the Ninth Circuit. See Painting Industry
of Hawaii Market Recovery Fund v. United States Dept. of the Air Force, 26 F.3d 1479 (9th Cir. 1994).

1 discovered or unknown to [her] until the hearing, but also that [he] could not with reasonable
 2 diligence have discovered and produced such evidence." Frederick S. Wyle Prof. Corp. v.
 3 Texaco, Inc., 764 F.2d 604, 609 (9th Cir. 1985). See also Coastal Transfer Co. v. Toyota Motor
 4 Sales, U.S.A., 833 F.2d 208, 211-12 (9th Cir. 1987) (to show abuse of discretion by district court
 5 in denying reconsideration, movant must show that new evidence could not have been
 6 discovered with due diligence, and was "of such magnitude that production of it earlier would
 7 have been likely to change the disposition of the case"). If Plaintiff had any relevant new facts,
 8 he should have asserted them in an opposition to Defendant's motion to dismiss – and certainly
 9 in his present motion. He has failed to do so.

10 Nor is relief available to Plaintiff under Rule 60(b)(6) of the Federal Rules of Civil
 11 Procedure. That provision permits a party to move for relief from a judgment or order "for any
 12 other reason justifying relief from the operation of the [decision]." Fed. R. Civ. P. 60(b)(6). To
 13 invoke this as a basis for his motion, Plaintiff would have to show that "extraordinary
 14 circumstances" justify the rule's application. Alpine Land & Reservoir Co., 984 F.2d at 1049.
 15 Rule 60(b)(6) is to be "used sparingly" as a way "to prevent manifest injustice." Id.

16 Plaintiff has not shown that dismissing his case would cause such manifest injustice.
 17 Although he continues to make a series of allegations about fraud and conspiracies, he has
 18 provided no factual support for his claims. More important, even if his accusations were
 19 accepted at face value, he has not identified any misconduct bearing on the Court's dismissal or
 20 so egregious as to justify reconsideration of the dismissal.

21

22 B. Plaintiff's Motion Fails to Fulfill the Standard Required for a
 23 Motion for Reconsideration.

24 Plaintiff has also failed to meet the standard required for a motion for reconsideration.
 25 The analysis for a motion for reconsideration is substantially similar to that conducted on a
 26 motion to set aside a judgment. Local rule 7.1(i) provides that whenever any motion or
 27 application for reconsideration is made, the party seeking such relief must present to the judge an
 28 affidavit or certified statement setting forth the material facts and circumstances surrounding

1 each prior application, including: (1) when and to what judge the application was made, (2) what
2 ruling or decision or order was made thereon, and (3) what new or different facts and
3 circumstances are claimed to exist which did not exist, or were not shown, upon such prior
4 application. Plaintiff has failed to provide such an affidavit or certified statement. Moreover,
5 as discussed above, Plaintiff has failed to identify new or different facts or circumstances which
6 did not exist or were not shown during prior application. Accordingly, Plaintiff's motion fails.

7

8

III. CONCLUSION

9 Plaintiff's motion rehashes allegations and arguments raised in prior pleadings, all of
10 which were considered and ruled upon when the Court entered its Order of June 24, 2008.
11 Additionally, Plaintiff has raised no new evidence or law that would justify disturbing the
12 Court's Order and Judgment. Consequently, Defendant respectfully requests that the Court deny
13 Plaintiff's instant motion.

14

15

DATED: July 31, 2008

KAREN P. HEWITT
United States Attorney

16

17

/s Steve B. Chu

18

19

STEVE B. CHU
Assistant U.S. Attorney
Attorneys for all Federal Defendants

20

21

22

23

24

25

26

27

28